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AND

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OF THE PHILADELPHIA BAR

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"I cannot do better than base my theory of governmental action upon the words and deeds of one of Pennsylvania's greatest sons, Justice James Wilson."—PRESIDENT ROOSEVELT.

WITH these words Theodore Roosevelt, in a recent oration,* focussed public attention upon James Wilson, who through the vista of the nineteenth century is looming the intellectual colossus of the formative years of the Republic, and whose principles must eventually be the basis for the solution of those subtle constitutional problems which result from our closely interlocked dual form of government. To many in our day, James Wilson will prove a revelation; to others, to an unnumbered throng ever increasing with the oncoming years, his governmental theories will be a never-failing source of inspiration; and to the nation the Wilson doctrine is the harbinger, the hope and the salvation for untrammelled forward progress in the field of destiny.

The object of these pages shall be to place this man in true perspective before the people whom he loved and in whose service he died. In order to do so, the writer will not confine himself to the enunciation of his personal views, lest in the recital Wilson suffer; but, with "wealth of quotation," he will draw from the opinions of that little band of constitutional lawyers and historians who, in the examination of the great problems of governmental action, are never satisfied until they have mastered the principles and sought the sources, and who, in seeking, found —James Wilson, luminous, transcendant, constitution-maker, nation-builder; the intellectual giant, in whose train have fol-

* Dedication of Pennsylvania's new Capitol, October 4th, 1906.

lowed that great galaxy of constitution interpreters—Hamilton, Jay, Webster, Bradley, Taney and, peer of all, John Marshall —whose work and whose names are an immortal part of our common heritage.

In juridical learning, in national patriotism, in the power to make things happen, the dynamic intellectual power, no man of the great constructive days of the American Republic excelled James Wilson. He was a member of the Continental Congress, a signer of the Declaration of Independence, great leader in the United States Constitutional Convention and a Justice of the Supreme Court by appointment of Washington on the establishment of that Court. More than any one man he made the Declaration possible and practically effective. His vote made it possible; for without the prestige of Pennsylvania's vote, it would probably have failed of affirmative action, and certainly would have proved abortive. Two of the Pennsylvania delegates (John Dickinson and Robert Morris) were unwilling to support action so radical, and declined to vote. Exclusive of Wilson, the four remaining Pennsylvania delegates were evenly divided, and Wilson, untrammelled by the influence of the learned Dickinson, his preceptor in the law, and holding the balance of power, wielded it for the cause of liberty and independence. Furthermore, he made the Declaration practically effective by holding off the vote until there was substantial backing *by the people,* thereby securing virtual unanimity of endorsement. This is evidenced by an extraordinary certificate, recently located by the writer in the National Archives, signed by John Hancock, Thomas Jefferson, John Adams, Edward Rutledge, Robert Morris, and other members of the Continental Congress setting forth Wilson's attitude in the matter of the Declaration. In a forty-page pamphlet, written some years before and published to the world twenty-three months in advance of the Declaration of Independence, and extensively circulated among the members of the first Continental Congress, he used the phrase "all men are by nature free and equal," and at the same time he enunciated the doctrine that, by the British constitution, Parliament possessed no legislative power over the colonies, sustaining his argument with copious authority. Again in January, 1775, he was far in advance of other patriots, asserting at Philadelphia in a provincial convention, in a speech which will ever

stand as one of the highest types of American oratory, that George III, "forgetting his character and dignity, has stepped forth, and openly avowed and taken part in the iniquitous conduct" of his ministers and Parliament, thereby violating the British constitution; and he proposed to the convention a resolution declaring:

> "That the acts of the British Parliament for altering the charter and constitution of the colony of Massachusetts Bay, . . . for shutting the port of Boston, and for quartering soldiers on the inhabitants of the colonies are unconstitutional and void. . . . That all force employed to carry such unjust and illegal attempts into execution is force without authority; and that it is the right of British subjects to resist such force; that this right is founded upon both the letter and the spirit of the British constitution."

At the outbreak of the Revolution, he organized a regiment. He later became Brigadier-General and the Director-General of the Pennsylvania Militia. In the Continental Congress he was chairman of the committee on "Defence of Philadelphia," then the seat of government, and an active member of the Board of War. He was also Advocate-General for France in America, serving without pecuniary compensation.

It is now conceded by those most competent to pass judgment that, in the great Constitutional Convention of 1787, he was the most learned and intellectually the ablest of the members. His power and influence were exceeded by the delegate of no other State. Indeed, Wilson made such an impress upon the Convention that, after it had been in session two months, he was elected by ballot one of the Committee of Five on detail, to which was intrusted the work of actually drafting the Constitution, and he is reputed to have been the chairman of that committee. In the deliberations of the Convention, his services were probably of more practical value than those of any other delegate. Madison's minutes show that in vital matters his intellect dominated the proceedings. Contemporaneous records make clear that it is no undue praise to record that, without the force, power and tact of Wilson in the Constitutional Convention, without his persuasive arguments and profound learning, no agreement could have been reached upon a federal Constitution which would have been ratified, or which, if ratified, would have stood the stress of conflict through a score of years.

The key-note of Wilson's entire career is his unyielding faith *in the people* as the rock upon which of necessity a republic must stand. His faith in the people was more practically sincere, more real, more abiding than Jefferson's. He believed that all sovereignty—the sovereignty of a nation, with all the powers and incidents appertaining thereto—was lodged in the people, *the people of the nation collectively,* and not in the States *qua* States, or in the people as segregated into particular States.

His services in the Constitutional Convention cannot well be overestimated. Hampton L. Carson, the Attorney-General of Pennsylvania and historian of the Supreme Court of the United States, refers to them in part as follows:

"He desired that the various branches of the new Government should be thoroughly independent of each other. While willing to preserve the State governments he sought to guard the General Government against the encroachments of the States. . . . He pointed out the advantages of a national government over one purely federative, and showed that the individuality . . . of the States was not incompatible with a general government. He wished the executive to consist of but one person, and proposed that the President should be chosen by electors elected by the people. . . . He urged that senators as well as representatives should be chosen by the people. . . . He advocated a proportional representation of the States in Congress. . . . He desired a provision that the contracts of the Confederation should be fulfilled, and advocated a guarantee to the States of republican institutions. He opposed a proposition to allow the States to appoint to national offices, and doubted whether the writ of *habeas corpus* should ever be suspended. He contended for an absolute prohibition upon the States relative to paper money and also for a provision prohibiting the passing of laws impairing the obligation of contracts. . . . He is strangely unknown, considering the high position to which he is entitled."

This is but a brief outline of a few of the great themes to which Wilson addressed himself in the Convention. Madison's minutes strikingly portray his invaluable and brilliant services.

In Pennsylvania the fight for the ratification of the United States Constitution was intense, and to Wilson's herculean labors in its behalf, to his oratory, to the power and logic of his arguments, more than to anything else, was the final victory due. This Pennsylvania contest was bitter, and Wilson was burned in effigy by the anti-federalists. Had the work of the Constitutional Convention been repudiated by Pennsylvania, its adoption by a sufficient number of States could not have been secured.

Curtis, in his "Constitutional History of the United States," says:

[Wilson's Pennsylvania speech for ratification] "is one of the most comprehensive and luminous commentaries on the Constitution that has come down to us from that period. It drew from Washington a high encomium, and it gained the vote of Pennsylvania for the new Government against the ingenious and captivating objections of his opponents."

Bancroft declares:

"But for one thing, without doubt, Pennsylvania would have refused to have ratified the Constitution, and that one incident marks alike the technical knowledge, the comprehensive grasp and force of argument of this great man."

Graydon says of him:

"He never failed to throw the strongest light on his subjects, and seemed rather to flash than elicit conviction syllogistically. He produced greater orations than any other man I have ever heard."

Francis Hopkinson, on December 14th, 1787, wrote Thomas Jefferson, then in Paris:

"This [the new Constitution] has been the subject of great debate in our convention [the Pennsylvania ratifying convention], and perhaps the true principles of government were never upon any occasion more fully and ably developed. Mr. Wilson exerted himself to the astonishment of all hearers. The powers of Demosthenes and Cicero seem to be united in this able orator. The principal speeches have been taken in shorthand."

James DeWitt Andrews, of the New York Bar, pays him this tribute:

"The correctness of his conclusions upon constitutional matters may be judged when we find that he not only maintained that it was the power and the duty of the courts to declare void legislative acts which contravene the Constitution, but he also clearly explained that a legislative grant was a contract, and also in the same connection maintained that the charter of a corporation might in some cases be a contract, which view was adopted in the Dartmouth College case. Still more remarkable is his argument upon the inherent powers of the nation, which he maintained existed outside of enumerated powers, in cases where the object involved was entirely beyond the power of the States and was a power ordinarily possessed by sovereign nations. Thus by these arguments anticipating the grounds taken by Judge Marshall in Fletcher *v.* Peck, Dartmouth College case and Marbury *v.* Madison, and also the positions necessarily taken in order to arrive at the legal conclusions reached in the legal tender causes."

Bancroft remarks:

"We have all read of the great argument of Webster, that the Constitution is not a compact. Wilson in the Convention presented this question thus: 'This system is not a compact. I cannot discern the least trace of a compact. The introduction to the work is not an unmeaning flourish; the system itself tells what it is, an ordinance, an establishment of the people.'"

In a long and remarkable holographic letter to George Washington, dated December 31st, 1791, recently located in the Washington Archives, Wilson urged the importance of a digest of the laws of the United States, which should clearly define the limits of State and National rights, and he himself offered to undertake the task. With prophetic vision he seemed to see the oncoming Civil War and hoped to prevent it. In this letter to Washington he said (italics indicate Wilson's underscoring):

"The most intricate and the most delicate questions in our national jurisprudence will arise in running the line between the authority of the National Government and that of the several States. . . . A controversy, happening between the United States and any particular State in the Union, will be viewed and agitated, with bias and passion, like a question of *politics*. For this reason, the principles and rules on which it must be determined should be clearly and explicitly known *before it arises*. . . . It is probable, therefore, that the directions which the line above mentioned ought to take, may be traced with a satisfactory degree of *clearness* as well as of precision; and that neither *vacancies* nor *interferences* will be found, between the *limits* of the two jurisdictions. For it is material to observe, that both jurisdictions *together* compose or ought to compose only *one* uniform and comprehensive system of government and laws."

Had Wilson been selected to undertake the work he outlined to Washington, who shall say but that the great Civil War might have been avoided? For it is possible that, had the line between State and National powers been run, clearly and forcefully, as Wilson would have run it, "before"—as Wilson put it—"before a controversy happening between the United States and any particular State in the Union" had been "agitated with bias and passion," the great issue would never have reached such a crisis that only the arbitrament of shot and shell and a nation's blood could settle it. It would have cut from under the feet of Calhoun and his followers the very ground upon which they relied for popular support. Listen to the words of Professor A. C. McLaughlin, formerly of Harvard and the Car-

negie Institution, now at Ann Arbor. He quotes, from Madison's minutes of the Constitutional Convention, a paragraph from the notes on Wilson's speech of June 25th, 1787, in favor of the election of United States senators by direct vote of the people, to wit:

"He [Wilson] was opposed to an election by the State legislatures. In explaining his reasons, it was necessary to observe the twofold relations in which the people would stand,—first, as citizens of the General Government, and, secondly, as citizens of their particular State. The General Government was meant for them in the first capacity; the State governments in the second. Both governments were derived from the people, both meant for the people; both, therefore, ought to be regulated on the same principles. . . . The General Government is not an assemblage of States, but of individuals, for certain political purposes; it is not meant for the States, but for the individuals composing them. The individuals, therefore, not the States, ought to be represented in it."

Professor McLaughlin comments as follows:*

"Wilson in these sentences gave the fundamental idea of the federal State; and because it was he who did present these thoughts so conspicuously, he deserves unstinted praise. This double allegiance and double obedience owed by each citizen to two governments, each distinct from the other, and each supreme in its own field, is the most striking and the most important feature of the political organization of our country. . . . It represents the greatest of our achievements in statecraft. It is wonderful that Wilson should have grasped this principle so firmly and insisted on it so strenuously, when the men around him were striving eagerly for some local advantage or, if wise and generous, were too often lost in the contemplation of the mere mechanism of government. Seventy years later, at another fateful period in our history, statesmen saw but dimly this great fundamental fact in our political system. James Buchanan and Jeremiah S. Black, wrestling in agony of spirit with the problems of secession, begat together the mysteries of that wonderful message, which declared that secession was illegal, but that there was no legal means to prevent it, because the National Government could not coerce a State. They apparently did not comprehend these elementary facts which Wilson so clearly stated."

Although Wilson is strangely unknown, even to intelligent educated Americans, constitutional historians have at last begun to realize his place as nation-builder.

John Bach McMaster recently declared:

"I believe Wilson to be the most learned lawyer of his time. As a statesman, he was ahead of his generation in foresight. *Many of the*

* "James Wilson and the Constitution," *Polt. Sc. Qr.*, March, 1897.

great principles of government advocated by him, we, as a nation, are only beginning to apply."

James Bryce, in his "American Commonwealth," speaks of "the acuteness of James Wilson," and declares him to have been "one of the deepest thinkers and most exact reasoners among the members of the Convention of 1787." He also says of him:

"The speeches of the latter in the Pennsylvania ratifying convention, as well as in the great Convention of 1787, display an amplitude and profundity of view in matters of constitutional theory which place him in the front rank of the political thinkers of his age."

Commenting on Wilson's law lectures, James DeWitt Andrews, long the chairman of the American Bar Association's Committee on Classification of the Law, and the editor of the last edition* of Wilson's Works, remarks:

"Would you trace the history of popular governments, you will find the whole outline traced by the master hand of Wilson in these lectures, prepared especially to instruct the American student as to the difference between the institutions which had before existed, and the political system of law and government which exists in the United States. . . . In one respect Wilson's works are remarkable. It is in this: each fundamental principle is in every instance traced to its source, whether it shall be a principle enunciated by Socrates, Aristotle, Cicero, Gaius, Puffendorf, Locke, Grotius or Hobbes, Descartes or Hume, Vattal or Domat, who may have written upon some proposition or problem of the law or government. Little of value seems to have escaped the examination of our author, and the number of references to classical jurists, philosophers, politicians or historians who have written upon subjects connected with jurisprudence is remarkable."

Andrews also says:

"The address upon the powers of the British Parliament stands unequalled by anything upon the same subject, and the argument upon the Bank of North America stands as a constitutional exposition second to no constitutional argument or opinion delivered before or since. Indeed it not only embraced every ground of argument which Marshall was called upon to treat, but it assumed and defined precisely the position which was necessarily taken in the Legal Tender decisions."

Bryce pays Wilson the tribute of being the first statesman, British or American, to have an adequate comprehension of the powers and limitations of the British system of government. Referring to one phase of it, he declares:

* Published at Chicago in 1896. The first edition was issued at Philadelphia in 1804, in three handsome volumes, with engraving of the author, and under the direction of Bird Wilson.

"The first statesman who remarked this seems to have been James Wilson, who said in 1787: 'The idea of a constitution limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain. There are at least no traces of practice comformable to such a principle. The British Constitution is just what the British Parliament pleases. When the Parliament transferred legislative authority to Henry VIII, the act transferring it could not, in the strict acceptation of the term, be called unconstitutional.'"

Again, referring to the United States Constitution, Bryce says:

"Such novelty as there is belongs to the scheme of a supreme or rigid Constitution, reserving the ultimate power to the people, and limiting in the same measure the power of a legislature. . . . This was clearly stated by James Wilson of Pennsylvania, one of the deepest thinkers and most exact reasoners among the members of the Convention of 1787. Speaking of the State constitutions, he remarked in the Pennsylvania Convention of 1787: 'Perhaps some politician who has not considered with sufficient accuracy our political systems would observe that in our governments the supreme power was vested in the constitutions. This opinion approaches the truth, but does not reach it. The truth is that, in our governments, the supreme, absolute and uncontrollable power remains in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions.'"

Bancroft brings out clearly Wilson's grasp of the fact that, under the American Constitution, all sovereignty remains in the people. He records:

"The fiercest day's debate in Pennsylvania was upon the omission in the federal Constitution of a Bill of Rights. Wilson, rising to prove that there was no need of a Bill of Rights, said: 'The boasted Magna Charta of England derives liberties of the inhabitants of that kingdom from the gift and grant of the king, and no wonder the people were anxious to obtain Bills of Rights; but here the fee-simple remains in the people, and by this Constitution they do not part with it. The preamble to the proposed Constitution, "*We, the people of the United States, do establish.*" contains the essence of all the Bills of Rights that have been or can be devised.'"

Vice-Chancellor Emery of New Jersey recently said:

"If Wilson performed no other service to the nation, he deserves our unending gratitude for introducing into the nomenclature of constitutional law the phrase 'obligation of contracts,' and securing the adoption of the form of constitutional mandate, 'No State shall pass any law impairing the obligation of contracts.'"

Of Wilson, former president of the American Bar Association Simeon E. Baldwin, Justice of the Supreme Court of Connecticut and professor in the Yale Law School, writes:

"*He was the real founder of what is distinctive in our American jurisprudence,* and his arguments for the reasonableness and practicability of international arbitration were a century ahead of his time."

His views on international law, remonstrance, intervention, mediation and arbitration are profound, and, though set forth more than a century ago in his published works, we are but barely coming abreast of them. For international arbitration, Wilson argued thus:

"Individuals unite in civil society and institute Judges with authority to decide, and with authority also to carry their decisions into full and adequate execution, that Justice may be done and war may be prevented. Are states too wise or too proud to receive a lesson from individuals? Is the idea of a common Judge between nations less admirable than that of a common Judge between men? If admissible in idea, would it not be desirable to have an opportunity of trying whether the idea may not be reduced to practice?"

Wilson was profoundly learned in the Roman or Civil Law, and concerning his argument for international arbitration, Andrews remarks:

"He refers to the sentiments expressed in the Alcoran; to the example of the Amphictyony; to the Lacedæmonian arbitration between Megara and Athens; to the offer of the Romans to arbitrate; and lastly to . . . the words of Thucydides, where he says: 'It is cruel and dedestable to treat him as an enemy who is willing to submit his case to an arbitration.'"

Speaking of the United States Constitutional Convention, John Marshall Harlan, now the senior Justice of the Supreme Court of the United States, in 1900, said of Wilson:*

"He was recognized as the most learned member of that notable body. Webster said that Justice was the great interest of man on earth. Of Justice, as illustrated by the science of the law, Wilson had been an earnest devotee from his early manhood. In the highest and best sense he was a great lawyer. Still more, he had become a master in the science of government. He was therefore preeminently qualified to take part in laying the foundations of institutions under which the rights of man would be secure against the assaults of power. What a privilege it was to look upon that convention of patriots and statesmen—the wisest assemblage of public servants that ever convened at any time in the history of the world—no one of them wiser than James Wilson."

* "James Wilson and the Formation of the Constitution," *Amer. Law Review* Aug.-Sept., 1900.

Chisholm *versus* Georgia, the first of the great constitutional cases to arise in the Supreme Court of the United States—the only one while Wilson was a Justice of it—exemplifies his grasp upon fundamental principles. Of the all-potent decision in that case, Judge Cooley, in his lectures on American Constitutional History, says:

"Justice Wilson, the ablest and most learned of the associates, took the national view and was supported by two others. . . . The Union could scarcely have had a valuable existence had it been judicially determined that the powers of sovereignty were exclusively in the States or in the people of the States severally. Neither is it important that we proceed to demonstrate that the doctrine of an indissoluble union, though not in terms declared, is nevertheless in its elements, at least, contained in that decision. The qualified sovereignty, National and State, the subordination of State to Nation, the position of the citizen as at once a necessary component part of the federal and of the State system, are all exhibited."

"The Nation," in 1896,* in reviewing the Andrews edition of Wilson's Works, referred to this great decision, and said:

"The sovereignty of the Union had been recognized, the idea of the State as a subordinate political agency had been formulated—views to be wholly lost sight of, and to be vindicated two generations later by force of arms in a conflict which ended in their complete triumph. One of the earliest heralds of the true constitutional meaning and scope of that great conflict seems to have been Wilson. The opinion in Chisholm *vs.* the State of Georgia is really his best monument. . . . [It is] that of an orator, a publicist, a scholar and a metaphysician, dissatisfied with himself unless he could show that the decision he had reached was called for, not merely by the Constitution, but by all history, all law, and finally by all philosophy."

J. O. Pierce, in an article† characterizing Wilson as the "Pioneer of American Jurisprudence," said of this decision:

"On the foundation of this decision rests the governmental fabric of the United States. . . . Wilson set to himself the task of answering the question, 'Do the people of the United States form a nation?' This question is illustrated by copious classical, historical and juridical references, presented with the vivacity of an earnest debater, the answer constituting a thesis in which the broad observations of a scholar, the close analysis of a jurist, and the profound researches of a philosopher are happily united. . . . His distinctions between statehood and sovereignty, his terse assertions of the sovereignty of the people, his illus-

* Vol. LXII, p. 494.

† *The Dial*, Vol. XX, p. 236.

trations of the inherent characteristics and the high honor of that sovereignty, and his close analysis of all the governmental questions involved in the American system, might to-day be well taken as a text-book by the student of our institutions."

Pierce also, with rare and brilliant insight, remarks of Wilson:

"But not in his generation could a just discrimination assign to his labors, or to those of his colaborers, their relative or comparative value or importance. Who could then have foreseen, for instance, the subsequent decision in the Dartmouth College case, to be followed by a long train of adjudications establishing corporate rights under charters? Who could then have anticipated the desirability of ascertaining and locating the earliest assertion of the constitutional principle that a legislative contract is protected against legislative encroachment? Who could have foreseen the judicial career of a Marshall, or have believed possible a civil war between the adherents of Webster's constitutional views and the partisans of Calhounism? The great creative work of Wilson as a constitutional jurist could scarcely have been assigned its true position in our juridical edifice at any time prior to the late war."

Such are a few of the encomiums paid Wilson by those who are beginning to realize the transcendent value of his work.* Yet this man, popularly so little known and to whom the American people owe so much, lies buried in a distant State, where he died one hundred and eight years ago, far from kith and kin, and in a grave whose headstone even has no name on it.

Little wonder is it that James Bryce exclaimed in his American masterpiece: *"Wilson is one of the luminaries of the time to whom subsequent generations of Americans have failed to do full justice."*

Now a change has come, and near the Ides of November the remains of this great man will be tenderly removed by the Governor and people of Pennsylvania to rest at the side of his wife in old Christ Church burial-ground, Philadelphia, not far from the tomb of Benjamin Franklin and other patriots.

"At last," as said Joseph H. Choate the other day, "at last the nation is beginning to appreciate Wilson." The United States Government will convey the remains to Philadelphia on an armored cruiser of the Navy. On arrival, they will be received with the highest civic and military honors, and escorted to Independence Hall, where for twenty-four hours they will

* See illuminating sketch by Frank Gaylord Cook, *Atlantic Monthly*, September, 1889; also 1906, annual address before Pa. Hist. Soc. by Burton Alva Konkle, the historian, the most comprehensive and only complete biographic outline so far attempted (not yet in print).

lie in state at the scene of his greatest triumphs, in the sacred spot where he successfully battled for the Declaration of Independence, where he bore so valiant a part in the mighty intellectual and victorious struggle of 1787 to make the American colonies a nation, and where he also sat as the first great Justice of the Supreme Court of the United States, breathing the breath of national life into the Constitution. At his bier, to do him honor and voice their tributes, will gather high Federal and State officials, the Supreme Court of the United States, representatives of the Congress, and the Attorney-General of the United States by express delegation of the President to speak for the executive department of the Government. Thus will the last of the "fathers of the Republic," whose ashes have as yet found but temporary sepulchre, be laid to rest.

Yet in one sense Wilson is not dead. His spirit like the fires of eternal Truth can never die. It is stronger and more powerful than a century ago, by force of the great principles he enunciated, and which have gained stability with the advance of liberty and the growth of republican institutions the world over. It is not so much as statesman but as jurist Wilson now lives with us. As statesman, his work for America ended with the adoption of the Constitution and birth of the nation. They stand as an imperishable monument to what he and the fathers did as warriors and statesmen.

The true value of Wilson is not in the glory of past achievement, but in the fact that his doctrine of constitutional interpretation is big with possibilities for the future, and potent to prove the solvent for every constitutional problem involved in the delicate questions resulting from State individuality and National sovereignty. His doctrine has stood immovable through the storm and stress of civil war, binding together the foundations of the Federal Government as they tottered; and in times of peace it proved the guide for executive action by Washington and Jackson, and for judicial interpretation by John Marshall.

> "'Tis the set of the soul
> That decides the goal,
> And not the calm or the strife."

And now it is President Roosevelt who embodies the spirit of the Wilson doctrine. In his last notable public utterance, he declared:

"I cannot do better than base my theory of governmental action upon the words and deeds of one of Pennsylvania's greatest sons, Justice James Wilson. Wilson's career has been singularly overlooked for many years, but I believe that more and more it is now being adequately appreciated. . . . He was a signer of the Declaration of Independence. He was one of the men who saw that the Revolution, in which he had served as a soldier, would be utterly fruitless unless it was followed by a close and permanent union of the States; and in the Constitutional Convention, and in securing the adoption of the Constitution and expounding what it meant, he rendered services even greater than he rendered as a member of the Continental Congress, which declared our independence; for it was the success of the makers and preservers of the Union which justified our independence.

"He believed in the people with the faith of Abraham Lincoln; and, coupled with his faith in the people, he had what most of the men who in his generation believed in the people did not have — that is, the courage to recognize the fact that faith in the people amounted to nothing unless the representatives of the people assembled together in the National Government were given full and complete power to work on behalf of the people. He developed even before Marshall the doctrine (absolutely essential not merely to the efficiency but to the existence of this nation) that an inherent power rested in the nation, outside of the enumerated powers conferred upon it by the Constitution, in all cases where the object involved was beyond the power of the several States and was a power ordinarily exercised by sovereign nations.

"In a remarkable letter in which he advocated setting forth in early and clear fashion the powers of the National Government, he laid down the proposition that it should be made clear that there were neither vacancies nor interferences between the limits of State and National jurisdictions, and that both jurisdictions together composed only one uniform and comprehensive system of government and laws; that is, whenever the States cannot act, because the need to be met is not one of merely a single locality, then the National Government, representing all the people, should have complete power to act. It was in the spirit of Wilson that Washington, and Washington's lieutenant, Hamilton, acted; and it was in the same spirit that Marshall construed the law."

And here the President applies the Wilson doctrine to the vital issue of our day.

"It is only by acting in this spirit that the national judges, legislators, and executives can give a satisfactory solution of the great question of the present day—the question of providing on behalf of the sovereign people the means which will enable the people in effective form to assert their sovereignty over the immense corporations of the day. Certain judicial decisions have done just what Wilson feared; they have, as a matter of fact, left vacancies, left blanks between the limits of possible State jurisdiction and the limits of actual National jurisdiction over the control of the great business corporations. It is

the narrow construction of the powers of the National Government which in our democracy has proved the chief means of limiting the national power to cut out abuses, and which is now the chief bulwark of those great moneyed interests which oppose and dread any attempt to place them under efficient governmental control.

"Many legislative actions and many judicial decisions, which I am confident time will show to have been erroneous and a damage to the country, would have been avoided if our legislators and jurists had approached the matter of enacting and construing the laws of the land in the spirit of your great Pennsylvanian, Justice Wilson—in the spirit of Marshall and of Washington. Such decisions put us at a great disadvantage in the battle for industrial order as against the present industrial chaos. If we interpret the Constitution in narrow instead of broad fashion, if we forsake the principles of Washington, Marshall, Wilson and Hamilton, we as a people will render ourselves impotent to deal with any abuses which may be committed by the men who have accumulated the enormous fortunes of to-day, and who use these fortunes in still vaster corporate form in business.

"The legislative or judicial actions and decisions of which I complain, be it remembered, do not really leave to the States power to deal with corporate wealth in business. Actual experience has shown that the States are wholly powerless to deal with this subject; and any action or decision that deprives the nation of the power to deal with it, simply results in leaving the corporations absolutely free to work without any effective supervision whatever; and such a course is fraught with untold danger to the future of our whole system of government, and, indeed, to our whole civilization."

This, the President's clarion call back to the doctrines of James Wilson and the other federalist fathers, should prove epoch-making. The basic principles of these doctrines Wilson enunciated before even a single one of the Federalist papers had been written, and they proved the intellectual inspiration to Washington, Madison, Jay, Hamilton and other leaders of the day. But the work did not stop there. The Wilson spirit lived on. The main line of the argument in Webster's famous reply to Hayne was clearly outlined by Wilson nearly a half-century before, and it was the backbone of the argument in Andrew Jackson's ringing proclamation of December, 1832, against Nullification, and of his powerful message of January, 1833, on the same subject. Both used Wilson's unanswerable arguments, and both builded upon the framework of his logic.

And so it was with Marshall in those great decisions which are the imperishable foundations of his immortality as Chief Justice. The revered Marshall's glory, as the greatest ex-

pounder of the issues raised under the Constitution, during the first century of the nation's life, can never pale; yet he was bounded and restricted by the limitations of the issues before him for adjudication. He could not exceed them, and research is showing that in what he did Marshall but courageously followed in the footprints of Wilson, who broke the trail and blazed the way for him, "ploughing," as has been said, "with his own heifer"; and, greater than expounder, Wilson stands as a creator—"the real founder of what is distinctive in our American jurisprudence" (Baldwin *supra*).

The Constitution marches on; new conditions and new problems are pressing for solution. Eventually, they must be met by the Supreme Court of the United States. The Wilson doctrine presents the key. Its essence, as well as its logical sequence, is simply this: *The Constitution should be so construed that there shall be neither vacancies nor interferences between the limits of State and National jurisdictions; both together should compose but one uniform and comprehensive system of government and laws.* The evolution of our national life, the onward and upward "march of the Constitution," Marshall's magic wand of interpretation and Webster's faultless logic—these all with unerring precision illumine Wilson's transcendent grasp of the fundamental principles of our dual form of government, which he so deftly wove into the matchless fabric of our Constitution.

This is neither the time nor the place for a technical exposition of the Wilson doctrine. A brief quotation, however, from Wilson's long and able argument on inherent national powers will be appropriate. This argument, made in 1785, when the United States was under the Articles of Confederation, is even more applicable to present-day questions under the Constitution:

"Has the United States in Congress assembled a legal and constitutional power to institute and organize the Bank of North America, by charter of incorporation? . . . .

"We presume it will not be contended that any or each of the States could exercise any power or act of sovereignty extending over all the other States or any of them; or, in other words incorporate a bank, commensurate to the United States. . . .

"Though the United States in Congress assembled derive *from the particular States* no power, jurisdiction, or right, which is not expressly delegated by the confederation, it does not thence follow, that

the United States in Congress have *no other* powers, jurisdiction, or rights, than those delegated by the particular States.

"The United States have general rights, general powers, and general obligations, not derived from any particular States, nor from all the particular States, taken separately; but resulting from the union of the whole; and, therefore, it is provided, in the fifth article of the confederation, that 'for the more convenient management of the *general interests* of the United States, delegates shall be annually appointed' 'to meet in Congress.'

"To many purposes, the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, powers and properties by the law of nations incident to such. *Whenever an object occurs, to the direction of which no particular State is competent, the management of it must, of necessity, belong to the United States in Congress assembled.* There are many objects of this extended nature."

Here Wilson's brilliant brain crystallized gems of logic which have ever since been running as "the dust of diamonds in the hour-glass" of our national jurisprudence.

Yet committees of the Congress, while knowing the necessity for sane federal action concerning some of the corporations engaged in business beyond the borders of the State of domicile, whose acts thereby extend from and beyond the State of origin into the Nation at large, deem the Congress restricted by phases of the doctrine of State rights; and even judicial committees, ignorant of the spirit of the Constitution *as expounded by Wilson,* believe the legislative branch of the Government paralyzed by reason of the judicial development of a *dictum* which crept into a decision of the Supreme Court, to the effect that insurance is not a subject of interstate commerce, wholly ignoring the fact that federal control may be sustained on far broader and more fundamental principles of constitutional interpretation than those governing the mere construction of the interstate commerce clause of the Constitution.

If, however, the Supreme Court, by a failure, at times, since the days of Marshall, to take a comprehensive view of the effects of certain judicial decisions—decisions which, without unsettling any property right or principle of law, might at least as logically have been the other way; such as, that the business of insurance conducted throughout the United States is not interstate commerce—if the Court, as a result of this, is actually permitting the executive and legislative departments of the Government

to be handicapped, then may the spirit of James Wilson, its first great Justice, and that of Marshall, descend upon the Court and at once! The reviewer here speaks as one of the sovereign people, who, while *under* the Constitution, are yet *behind* it, and by whose sanction alone it exists in its present form or any form, and who in the last analysis possess absolute power and jurisdiction to reverse even the Supreme Court. This power the people have already once exercised by an explanatory amendment—the eleventh to the Constitution—reversing, for political reasons in 1797, one of the points decided five years before in Chisholm *versus* Georgia, though leaving in full force the real value to the nation of that great decision. *If* the Supreme Court, through judicial acquiescence in the *dictum* in Paul *versus* Virginia, have constructively misconstrued the term "commerce," so far as the business of interstate insurance is concerned, so that it is beyond recall by their own act, the Constitution is yet equal to the emergency—and the Court, embodying the highest development of our civilization, will also be; for, ere, the Constitution left the skilled hands of the fathers, there was incorporated in it the provision that *"The Congress shall have power to . . . provide for the . . . general welfare of the United States."*

In recent years the public have heard much of the interstate commerce clause of the Constitution, but very little of the general welfare clause, yet it is the blanket provision of the Constitution, and it is a power which, while undoubtedly an inherent national power, the people of the nation have *specifically delegated* to the Federal Government by the Constitution. It enunciates in explicit terms the power of the Congress to exercise this the highest type of national sovereignty. It is destined in the centuries yet to come to have a vitally important place in our jurisprudence. It is capable of an infinite adaptation to the evolution of our life as a nation. Its proper application will make impossible either vacancies or interferences between State and National jurisdictions. Yet it is a sharp-edged and dangerous tool, like the surgeon's knife which, in skilled hands, deftly wielded, saves life; but misused, takes it. It awaits the deft hand of the second Marshall. He must yet arise, to declare, with the same keen insight and the same courage as the first, the power of the National Government

to legislate concerning every object relating to the general welfare of the United States *to which at least no particular State is competent,* and for him Wilson has cleared the path and blazed the trail as he did for the great Marshall. Any other theory belies the spirit of our institutions and declares the "march of the Constitution" ended.

And of Wilson* himself! No one who realizes his great creative work can but bow in deference to his genius and the mighty things achieved. What tribute of love, respect and veneration, however great, can be commensurate with Wilson's labors for the nation he loved, for the nation he helped to create and in whose service he died? Even if republics have been ungrateful in the past, shall it be said that the American Republic is ungrateful to such an one as Wilson? Perchance ere many years have passed, there will loom in bronze within the shadow of the Capitol at Washington, erected by *"the people of the United States,"* the giant form of Wilson, near that of Marshall, and in his hand a quill and scroll with "Constitution" inscribed thereon—*"Lest we forget, lest we forget."*

LUCIEN H. ALEXANDER.

* James Wilson was born near St. Andrews, Scotland, September 14th, 1742; educated at the Universities of St. Andrews, Glasgow and Edinburgh; emigrated to America, 1765; member of Continental Congress; signer of Declaration of Independence; member of the United States Constitutional Convention, 1787; Justice of the Supreme Court of United States, 1789-1798; died at Edenton, North Carolina, August 21st, 1798.